Supreme Court, U. S.
FILED
DEC 31 1979
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 79-5709

ROGER SCOTT THOMAS,

Petitioner

vs.

STATE OF ALABAMA,

Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

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BRIEF AND ARGUMENT OF RESPONDENT

OPINIONS BELOW

The opinion of the Alabama Court of Criminal Appeals affirming Petitioner's conviction is reported at 373 So. 2d 1149 (Ala. Cr. App. 1979). The opinion of the Alabama Supreme Court affirming the conviction and sentence is reported at 373 So. 2d 1167 (Ala. 1979).

QUESTIONS PRESENTED

I.

WHETHER THERE IS A CONSTITUTIONAL REQUIREMENT THAT A JURY BE ALLOWED TO CONSIDER LESSER INCLUDED OFFENSES IN A CAPITAL CASE?

II.

WHETHER THERE IS A DUE PROCESS REQUIREMENT THAT A JURY BE INSTRUCTED AS TO LESSER INCLUDED OFFENSES IN A CAPITAL CASE?

III.

WHETHER THE STATE OF ALABAMA HAS A LEGITIMATE STATE INTEREST IN PRECLUDING THE CONSIDERATION OF LESSER INCLUDED OFFENSES BY A JURY IN A CAPITAL CASE?

IV.

WHETHER THE TRIAL COURT MAY CONSTITUTIONALLY REFUSE TO SUSTAIN A CHALLENGE FOR CAUSE WHERE A JUROR, AFTER HAVING A QUESTION EXPLAINED TO HIM, UNEQUIVOCALLY STATES THAT HE CAN RETURN A VERDICT OF "NOT GUILTY" WHERE THERE IS A REASONABLE DOUBT OF THE DEFENDANT'S INTENT?

V.

WHETHER ALABAMA'S DEATH PENALTY STATUTE, WHICH ENUMERATES AGGRAVATING AND MITIGATING CIRCUMSTANCES FOR THE TRIAL JUDGE TO CONSIDER IN FIXING PUNISHMENT, MEETS THE REQUIREMENTS OF DUE PROCESS AND ENSURES INDIVIDUALIZED SENTENCING BASED ON THE CIRCUMSTANCES OF A GIVEN CASE?

VI.

WHETHER THERE WERE SUFFICIENT AGGRAVATING CIRCUMSTANCES IN THE INSTANT CASE TO WARRANT THE IMPOSITION OF THE DEATH PENALTY?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. This case involves the Eighth and Fourteenth Amendments to the Constitution of the United States.

2. This case also involves the Alabama Death Penalty Act, which is codified as Code of Alabama 1975, §13-11-1, et seq., and which is set out in full and attached as Appendix C to Petitioner's brief.

STATEMENT OF THE CASE

The Petitioner, Roger Scott Thomas, was indicted by the Grand Jury of Sumter County, Alabama on March 21, 1978, for the murder of one William Beville during the course of the robbery of Mr. Beville's home. Petitioner was tried under Code of Alabama 1975, Section 13-11-1, et seq., which makes the murder of a person during the course of a robbery a capital offense.

On November 20, 1977, Petitioner, who was in jail, informed the jailer that he wanted to talk to an investigator named Billingsley. Billingsley asked Petitioner if he wanted an attorney present, and Petitioner said he did not (R. 167). Billingsley also gave the Petitioner a copy of his Miranda rights and Petitioner read and signed them (R. 165). He stated that he was giving his statement voluntarily and without any force, threat or reward of any kind (R. 172).

On May 15, 1978, the case went to trial. Petitioner was found guilty, the jury fixing his punishment at death by electrocution.

The trial court held a sentencing hearing on June 20, 1978, to determine whether there were sufficient mitigating or aggravating circumstances to warrant upholding the death penalty or commuting the penalty to life imprisonment without parole. At that hearing, the trial judge found none of the mitigating circumstances set forth under the death penalty statute. The trial judge found that the following aggravating circumstances were present:

1. The capital felony was committed by a person under sentence of imprisonment.

2. The defendant was previously convicted of another felony involving the use or threat of violence to the person.

3. The capital felony was committed while the defendant was engaged in committing a robbery.

4. The capital felony was committed for pecuniary gain.

5. The capital felony was especially heinous, atrocious and cruel.

The Court of Criminal Appeals specifically rejected aggravating circumstance number 4, that the capital felony was committed for pecuniary gain, stating that such would be condemning the Petitioner twice for the same offense involving an attempt at pecuniary gain.

Based upon these findings, the trial court sentenced Roger Thomas to death by electrocution (R. 273, 277, 279).

The Alabama Court of Criminal Appeals affirmed the conviction on March 27, 1979. The Petitioner filed an application for rehearing on March 27, 1979, which application was denied. The State of Alabama also filed an application for rehearing, asking the Court to amend the language in footnote 1 of page 19 of the Court's opinion, which rejected aggravating circumstances 3 and 4 which were cited by the trial judge. The State's contention was that only aggravating circumstance 4, and not 3, should be stricken. On May 7, 1979, the Court of Criminal Appeals, ex mero motu, amended its order of April 17, 1979 and corrected the language in footnote 1 as requested by the State, striking only aggravating circumstance no. 4.

Petitioner filed a petition for writ of certiorari with the Alabama Supreme Court, and this petition was granted as a matter of right, as required by Rule 39(c) of the Alabama Rules of Appellate Procedure, on May 8, 1979. On July 6, 1979, the Alabama Supreme Court affirmed Petitioner's conviction and sentence.

SUMMARY OF THE ARGUMENT

The Alabama death penalty statute does not allow the jury to return a verdict for a lesser included offense, and thus avoids the kind of jury discrimination deemed unconstitutional in Furman v. Georgia, 408 U.S. 238, 411. The preclusion of the consideration of lesser included offenses by Alabama's statute does not violate the due process clause. There is no constitutional right to a charge of lesser included offenses. Simply because a procedure has been established for a long period of time does not automatically dictate that there is a due process right to that procedure. It is not necessary to charge a jury on lesser included offenses in order to ensure that the jury be convinced of every element of the crime before they convict a capital defendant. Alabama has other safeguards to ensure that the jury will not convict unless convinced beyond a reasonable doubt. These include the fact that the jury is required to "fix the punishment at death," the fact that the jury has the option of a mistrial, and the fact that the trial judge conducts a sentencing hearing where he may reduce a death sentence to life imprisonment without parole.

The preclusion from consideration by the jury of lesser included offenses does not violate the Equal Protection Clause. The equal protection issue was not presented to the Alabama Court of Criminal Appeals or the Alabama Supreme Court, therefore this Court should refrain from hearing this issue.

There is no fundamental right to a jury instruction on a lesser included offense. The State of Alabama has a legitimate state interest in precluding the consideration of lesser included offenses by a jury in a capital case. This is due to the fact that the history of lesser included

offenses reflects that the consideration of them contributes to jury discrimination and arbitrariness and capriciousness in the imposition of capital punishment.

The trial court may constitutionally refuse to sustain a challenge for cause where a juror, after having a question explained to him, unequivocally states that he can return a verdict of "not guilty" where there is a reasonable doubt of the defendant's intent.

The aggravating circumstances enumerated under Alabama's death penalty statute meet the requirements of due process and ensure individualized sentencing based on the circumstances of a given case. The United States Supreme Court has previously upheld a statute similar to Alabama's, where many of the aggravating circumstances were included as elements of the original capital offense charged. Such a scheme in no way limits individualized consideration of each case, but does ensure reliability in the determination of a particular sentence.

In the instant case, the trial judge found four aggravating circumstances. These aggravating circumstances were sufficient to warrant the imposition of the death penalty.

ARGUMENT

I.

THERE IS NO CONSTITUTIONAL REQUIREMENT THAT A JURY BE ALLOWED TO CONSIDER LESSER INCLUDED OFFENSES IN A CAPITAL CASE.

As Petitioner suggests, the Alabama Legislature drafted Alabama's Death Penalty Act, Code of Alabama 1975, §13-11-1, et seq., in order to avoid the pitfalls of jury discrimination prohibited by Furman v. Georgia, 408 U.S. 238 (1972). The most effective way to ensure that the jury was not allowed the unfettered discretion to apply the death penalty in a discriminatory manner was to preclude their consideration of lesser included offenses. The preclusion of lesser included offenses from consideration by the jury avoids the pitfalls denounced in Furman, supra, and thereby promotes sentencing that is consistent with the Constitution.

Alabama's statute provides for judicial sentencing rather than jury sentencing. No capital punishment system which permits a jury to return a conviction on a lesser included offense in a capital case will ever attain the full advantages of judicial sentencing. As long as the jury has the kind of discretion which the availability of lesser included offenses allows them, the inconsistency denounced in Furman will be present and the greater consistency of judicial sentencing and appellate review of sentencing will always be undermined. See, Roberts v. Louisiana, 428 U.S. 325, 335 (1976) (plurality opinion). As stated in Woodson v. North Carolina, 428 U.S. 280, 302 (1976), any capital sentencing scheme in which jurors are tempted by the availability of lesser included offenses merely papers over the problem of de facto jury discretion.

A. THE PRECLUSION OF THE CONSIDERATION OF LESSER INCLUDED OFFENSES BY ALABAMA'S DEATH STATUTE DOES NOT VIOLATE THE DUE PROCESS CLAUSE.

Petitioner contends that the due process requirement that a state may not obtain a conviction until it has proven every element of the offense charged beyond a reasonable doubt is so basic to criminal jurisprudence in the United States that it is common knowledge. We do not argue with this premise. However, nowhere does Petitioner state or cite any authority for the proposition that there is a due process requirement that a jury be charged on lesser included offenses. Indeed, we are not aware of any cases setting such a requirement.

Simply because a procedure has been established for a long period of time does not automatically dictate that there is a due process right to that procedure. Another example of a well-established procedure that is not constitutionally required is the twelve-member jury. In Florida v. Williams, 399 U.S. 78 (1978), this Court held that states were not constitutionally required to use twelve-member juries even though that had been the fixed number of jurors since the middle of the 14th Century, id. at 87 n. 19, 89, even though earlier decisions had assumed that number was constitutionally required, id. at 90-92, and even though the federal courts and virtually all the states used that number. Id. at 103 n. 50; Id. at 136-137 (Harlan, J., concurring).

The history of lesser included offenses reflects that the doctrine developed to assist prosecutors where the evidence failed to establish some element of the offense charged. See, e.g., Keeble v. United States, 412 U.S. 205, 208 (1973); Kelly v. United States, 370 F.2d 227 (D.C. Cir. 1966), cert. denied 388 U.S. 913 (1967); United States v. Markis, 352 F. 2d 860, 866 (2nd Cir. 1965). This doctrine has never been held to be constitutionally required.

It is not necessary to charge a jury on lesser included offenses in order to ensure that the jury be convinced of every element of the crime before they hand down a conviction. Alabama has other safeguards to ensure that the jury will not convict unless convinced beyond a reasonable doubt.

First, if the jury finds that a defendant is guilty of some offense other than the capital offense charged, the jury is not faced with the choice of acquitting a criminal or of returning a verdict sentencing a man to death for a capital offense of which he is not guilty. Instead, the Alabama statutes specifically provide that the jury can refuse to agree on a verdict or on the sentence of death and thereby cause a mistrial. Code of Alabama 1975, §13-11-2(c). This is a very real, very important, option for the juror and safeguard for, the defendant. If a single juror does not agree with the majority, he is not required to vote to convict or acquit. He can simply fail to agree with the majority and cause a mistrial. There have been at least three mistrials to date under the Alabama statute. See, Evans v. Britton, 472 F. Supp. 707, 714-715.

The second safeguard is the requirement found in Code of Alabama 1975, §13-11-2 that before a jury can find any defendant guilty of a capital offense, it must "fix the punishment at death," even though the judge, rather than the jury, is the actual sentencing authority. While the jury is not the sentencing authority, the requirement that any guilty verdict it returns "fix the punishment at death" serves a very important function. Because of the profound difference between death and other punishments, greater reliability is necessary in capital cases. See, Lockett v. Ohio, 98 S. Ct. 2954, 2964 (1978) (plurality opinion). The fact-finding process should not be taken lightly. In a capital case, a procedural device is valuable

if it helps ensure that jurors vote to convict only those defendants of whose guilt the jurors are truly convinced beyond any reasonable doubt and to a moral certainty. The best way to ensure that jurors are aware of their awesome task and its terrible responsibilities is to confront them with it. That is what the statutory provision accomplishes when it requires the jury to phrase a guilty verdict in terms of the punishment at death, even though the jury is not the sentencing authority. Any capital sentencing system in which the jury is tempted to shift its responsibility to the judge runs the risk that guilt adjudication will not be as reliable as possible. Under Alabama's system, the jury has more reason to realize its serious responsibility and to discharge it with care.

The third safeguard contained in Alabama's statute is that the trial judge rather than the jury is the actual sentencing authority. Alabama's Death Penalty Act requires the trial judge to hold a sentencing hearing and carefully weigh the aggravating and mitigating circumstances in each case before deciding whether to sentence the defendant to death or to life imprisonment without parole. Code of Alabama 1975, §13-11-3 and §13-11-4.

Section 13-11-3 provides that the purpose of the sentencing hearing is "to aid the court to determine whether or not the court will sentence the defendant to death or to life imprisonment without parole." The statutory aggravating and mitigating circumstances which the trial court considers at the sentence hearing are set out in §§13-11-6 and 13-11-7. The statute further provides that any evidence which the court deems to have probative value may be received. Section 13-11-3 provides:

> "In the hearing, evidence may be presented as to any matter that the court deems relevant to sentence and shall include any matters relating to any of the aggravating or mitigating circumstances enumerated in Sections 13-11-6 and 13-11-7." [Emphasis added]

As this statutory language itself makes clear, the sentencing authority in Alabama is in no way precluded from considering as a mitigating factor any aspect of a defendant's character or record, any of the circumstances of the offense, and any other relevant evidence in mitigation that the defendant proffers as a basis for a sentence less than death.

The Alabama appellate courts have repeatedly held that the statute provides for the consideration of non-statutory mitigating circumstances. Cook v. State, 369 So. 2d 1251, 1256 (Ala. 1979); Jacobs v. State, 361 So. 2d 640, 652-654 (Ala. 1978); see also, Evans v. State, 361 So. 2d 654, 664 (Ala. Cr. App. 1977), aff'd, 361 So. 2d 666 (Ala. 1978), cert. denied, 440 U.S. 930 (1979); Neal v. State, 372 So. 2d 1331 (Ala. Cr. App. 1979), cert. denied, 372 So. 2d 1348 (Ala. 1979).

Thus, the sentencing function performed by the trial judge acts as an additional safeguard to ensure that even if there is sufficient evidence to warrant the imposition of the death penalty by the jury, the trial judge may nevertheless reduce the sentence to life imprisonment without parole if he finds that the totality of the circumstances do not warrant a sentence of death.

B. THE PRECLUSION FROM CONSIDERATION BY THE JURY OF LESSER INCLUDED OFFENSES BY ALABAMA'S DEATH STATUTE DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE.

At the outset, it should be noted that Petitioner did not raise this equal protection issue in either the Alabama Court of Criminal Appeals or the Alabama Supreme Court. Therefore, neither of the state appellate courts addressed or decided the equal protection issue.

Because the equal protection issue was neither presented to nor decided by the courts below, this Court has no jurisdiction over that issue and should refrain from deciding it. Moore v. Illinois, 408 U.S. 786, 799 (1972); Fuller v. Oregon, 417 U.S. 40, 50 n. 11 (1974); Street v. New York, 394 U.S. 576, 581-582 (1969); Bailey v. Anderson, 326 U.S. 203, 206-207 (1945); see 28 U.S.C., §1257 (2) and (3).

Should this Court nevertheless address the equal protection argument, Petitioner's premise is that only those defendants charged with a capital offense are denied the protection of a lesser included offense instruction and they are thereby denied equal protection. As stated earlier, page 8 , the State of Alabama has a legitimate interest in precluding from consideration by the jury in a capital case lesser included offenses to ensure that the jury does not have the discretion which would result in the sort of discrimination denounced in Furman v. Georgia, supra.

Petitioner maintains that the lesser included offense preclusion should be subjected to strict judicial scrutiny because it infringes upon his constitutional right to unprejudiced jury fact-finding and his right to life.

Strict judicial scrutiny of a classification is appropriate under the Equal Protection Clause when the classification operates to the disadvantage of a suspect

class or infringes upon a fundamental right. E.g., Massachusetts Board of Retirement v. Murgia, 427 U.S. 307, 312 (1976); San Antonio School District v. Rodriguez, 411 U.S. 1, 17 (1973). This Court has never declared capital defendants to be a suspect class for equal protection purposes. Again, the very purpose of the preclusion of lesser included offenses is to guard against unprejudiced jury fact-finding.

The real issue here is whether there is a fundamental right to a jury instruction on lesser included offenses. This Court held in San Antonio School District v. Rodriguez, supra, that the only rights which are "fundamental" for purposes of invoking strict scrutiny are those which are "explicitly or implicitly guaranteed by the Constitution." The availability of lesser included offenses, then, is not a fundamental right because the Constitution neither explicitly nor implicitly guarantees the availability of lesser included offenses.

To the extent that Petitioner's argument is based upon a claim that preclusion of lesser included offenses infringes his fundamental right to reliable fact-finding, then that argument must fail because preclusion under Alabama's statute does not jeopardize the reliability of fact-finding, and therefore capital defendants lose no protection under the statute.

Under traditional equal protection standards, a legislative classification is presumed to be valid if it bears some rational relationship to a legitimate state purpose. San Antonio School District v. Rodriguez, 411 U.S. 1, 40 (1973).

The history of lesser included offenses reflects their potential as a source of de facto sentencing discretion that can lead to some degree of arbitrariness and capriciousness in the administration of capital punishment. See, Woodson v. North Carolina, 428 U.S. 280,

291, 293 & n. 29, 302 (1976) (plurality opinion); id. at 311-313 (Rehnquist, J., dissenting); McGautha v. California, 402 U.S. 183, 199 (1971); Furman v. Georgia, 408 U.S. at 246-247 (1972) (Douglas, J., concurring). The principal reason the mandatory death penalty statute in Woodson v. North Carolina, supra, "simply papered over the problem of unguided and unchecked jury discretion," 428 U.S. at 302-303 (plurality opinion), was that it permitted the jury to convict on lesser included non-capital offenses. All that a North Carolina jury had to do to avoid the imposition of the death penalty under that statute was to return a verdict for second degree murder. The same was true of the Louisiana statute struck down in Roberts (Stanislaus) v. Louisiana, 428 U.S. 325 (1976), where the plurality reasoned that the availability of lesser included offenses "plainly invite[d] the jurors to disregard their oaths and choose a verdict for a lesser offense whenever they feel that the death penalty is inappropriate," thereby interjecting an element of capriciousness. 428 U.S. at 334-335 (plurality opinion). The prediction upon which Roberts is bottomed is that at least some Louisiana juries would convict of only a lesser included offense even though all the jurors were convinced that the greater capital offense had been proven. Woodson v. North Carolina, 428 U.S. at 314 (Rehnquist, J., dissenting).

As discussed in the preceding sections on due process, there are a number of safeguards built into the Alabama statute to ensure that the death penalty is imposed in a consistent, rational and undiscriminatory manner. These include the fact that the jury is required to "fix the punishment at death," the fact that the jury has the option of a mistrial, and the fact that the trial judge conducts a sentencing hearing where he may reduce a death sentence to life imprisonment without parole.

Petitioner cites a 96% conviction rate for capital offenses in Alabama where the defendant pled not guilty and an 86% conviction rate where the jury found the defendant guilty and punishment was contested (p. 8). He maintains that these statistics demonstrate that the statute is operating in an unconstitutional manner. Petitioner's argument overlooks the fact that the offenses made punishable by death under Alabama's statute are very narrowly drawn to include only the most dangerous and serious crimes. The conviction rate is as high as it is because only the most serious and most well-prepared cases are brought under the death statute. More time and effort is expended because of seriousness of the offense and the nature of the crime. If overwhelming evidence was not gathered in support of aggravated murder, the prosecution would use the regular homicide statute, where lesser included offenses would be available.

As Justice Jones of the Alabama Supreme Court notes in his dissenting opinion (amended version) in Clyde Cade v. State, No. 78-288 (May 25, 1979), of the 65 death penalty convictions returned as of the date of his opinion, 22 of those defendants were sentenced to life imprisonment without parole. Of the 22 cases in which a defendant was sentenced to life without parole, 13 were the result of a negotiated guilty plea and agreement at trial. In the remaining 9 cases, the defendant was convicted at trial on a plea of not guilty and was then sentenced by the judge to life without parole. These statistics prove that Alabama's act is not mandatory and that, even though a defendant is convicted under the act, he may receive a sentence of life imprisonment without parole.

In summary, the inclusion of lesser included offenses in a capital sentencing system is not constitutionally required. Preclusion of lesser included offenses serves important constitutional goals, and there is no evidence

whatsoever that it will result in the conviction of a defendant who is not guilty of a capital offense. In any event, the Alabama statutory system contains important safeguards to ensure that the death penalty is not imposed in an arbitrary or discriminatory manner.

II. THE TRIAL COURT MAY CONSTITUTIONALLY REFUSE TO SUSTAIN A CHALLENGE FOR CAUSE WHERE A JUROR, AFTER HAVING A QUESTION EXPLAINED TO HIM, UNEQUIVOCALLY STATES THAT HE CAN RETURN A VERDICT OF "NOT GUILTY" WHERE THERE IS A REASONABLE DOUBT OF THE DEFENDANT'S INTENT.

Although petitioner makes no argument in his petition regarding the refusal of the trial court to sustain a challenge for cause of one of the venireman at his trial, he does list this point as one of his "questions presented." Respondent will therefore briefly address that point.

Petitioner's question specifically is, "May the trial court constitutionally refuse to sustain a challenge for cause to a venireman who answers that he would find the accused guilty of capital murder even if he believed that he had not intentionally killed the victim?"

This question is misleading.

Juror Smith intially answered that he believed he would probably find the defendant guilty in response to the question propounded by defense counsel, "Is there anyone here, although you might believe he robbed him and he did kill him, but you had a question about the intent, is there anyone here who would find him guilty anyway?" (R. 44)

However, the trial court then questioned Juror Smith further, to clarify his feeling on the issue of intent. It is clear from the exchange that Juror Smith was initially confused by the question, but concluded with the finding that he could render a verdict of "not guilty" if there was a reasonable doubt as to whether the killing was intentional. Part of the exchange with Smith follows:

> "MR. WATKINS: Let me ask him one or two questions, Judge, since there is a challenge for cause. Now, Mr. Smith, would you be able to take an oath as a juror and listen to the evidence that

comes from the witness stand and be influenced only by that evidence that comes from that witness stand as to whether or not this man is guilty; assuming that he's innocent until the case starts; could you do that?

"MR. SMITH: Listen to the evidence?

"MR. WATKINS: Yes.

"MR. SMITH: Yes.

"MR. WATKINS: All right. Now, in doing that, would you require a reasonable doubt and if you find a reasonable doubt as to intent, would you be able to find him not guilty if the Judge instructed you that was the law?

"MR. SMITH: ...the question is not whether a person was killed or not?

"MR. WATKINS: That's not the question. No, sir.

"MR. SMITH: The question is the intent.

"MR. WATKINS: That is one of the requirements and one of the essential elements in this case. Would you require the State of Alabama to prove to you beyond a reasonable doubt that this man intentionally killed the deceased? Would you make that requirement, which the Judge is going to tell you is the law?

"MR. SMITH: Yes.

"MR. WATKINS: Then, if you're not convinced beyond a reasonable doubt that he intended to kill the deceased, then you would be able to find him not guilty, would you not?

"MR. SMITH: Right. If clear cut.

"MR. WATKINS: All right. I would oppose the challenge for cause.

"MR. BOGGS: I still challenge for cause.

"THE COURT: Before I rule I want to ask you one more time, Mr. Smith. If the evidence were such that there was a reasonable doubt in your mind as to the innocence or guilt of the defendant, would you be able to return a verdict acquitting the defendant; that is, turning the defendant aloose, returning a verdict of innocence, if there was a reasonable doubt in your mind as to whether it was an intentional killing or not? If there was a reasonable doubt in your mind, would you be able to return a verdict finding the defendant not guilty?

"MR. SMITH: Yes, if it was a reasonable doubt; a clear reasonable doubt.

"MR. WATKINS: Semantics, Judge, reasonable doubt.

"MR. BOGGS: I know and such semantics, I think he ought to be challenged for cause for justice to be done, Your Honor.

"THE COURT: Based on Mr. Smith's answer that if there were a reasonable doubt in his mind that he would acquit the defendant, I'm not going to grant a challenge for cause in that particular case.

"MR. BOGGS: We except, Your Honor. Is there anyone on this jury panel that if you were the only one; if you were the only one, Mr. Smith, everybody else wanted to electrocute Roger Scott Thomas, you said, well, based on the evidence I'm not sure that he intentionally killed him. I believe that he killed him, but I don't believe that he intentionally did it, so I'm not going to vote to electrocute him; would you stay there for two days if necessary or would you go ahead and vote guilty, if you believed he shot him?

"MR. SMITH: I would follow my own.

"MR. BOGGS: What would that be?

"MR. SMITH: If the evidence showed that he didn't intentionally kill him, it would be not guilty.

"MR. BOGGS: All right. You're convinced of that?

"MR. SMITH: Yes, sir.

"MR. BOGGS: Does everyone else feel the same way?

"THE COURT: Let the record show that that last statement was made by Mr. Smith." (R. 43-46) [Emphasis added]

Once Juror Smith understood that under the law intent must be proved beyond a reasonable doubt in order to convict a person under the death statute, he unequivocally stated that if there was a reasonable doubt as to intent, he could render a verdict of not guilty. At that point, there was no error in denying the challenge for cause.

The Court of Appeals, in holding that the trial court correctly overruled appellant's challenge for cause of juror Smith, cited the United States Supreme Court cases

of Witherspoon v. Illinois, 391 U.S. 510, 88 S. Ct. 1770, 20 L. Ed. 2d 776; and Davis v. Georgia, 429 U.S. 122, 97 S. Ct. 339, 50 L. Ed. 2d 339. In those cases, the U. S. Supreme Court determined that it was error to grant a challenge for cause where the juror stated a general objection to the death penalty. The Court held that the bias must be unequivocally stated; that the juror must specifically state that he would not, under any circumstances, impose a penalty of death before a challenge for cause could properly be granted. Certainly there was no unequivocal statement of bias in the instant case, therefore, the challenge for cause was properly denied.

III.

ALABAMA'S DEATH PENALTY STATUTE, WHICH ENUMERATES AGGRAVATING AND MITIGATING CIRCUMSTANCES FOR THE TRIAL JUDGE TO WEIGH AND CONSIDER IN FIXING PUNISHMENT, COMPORTS WITH THE REQUIREMENTS OF DUE PROCESS AND ENSURES INDIVIDUALIZED SENTENCING BASED ON THE PARTICULAR CIRCUMSTANCES OF A GIVEN OFFENSE.

Petitioner asserts that Alabama's death penalty act is constitutionally deficient because many of the aggravating circumstances enumerated are also elements of the capital offense charged. He cites "common sense" in support of his theory that the same fact should not be used in defining an offense and in finding aggravation of that offense.

This argument overlooks that fact that Alabama's statute was carefully drafted to provide very narrowly defined capital crimes in order to limit the application of the capital murder statute to the most serious of crimes. These narrow definitions of capital offenses are important in promoting the kind of sentencing that Furman v. Georgia, 408 U.S. 238 (1972) requires. In Lockett v. Ohio, 438 U.S. 586, 601 (1978), the Supreme Court explained that Furman, supra, requires that sentencing discretion be "directed and limited" so that the death penalty will be imposed in a more "consistent and rational manner" and so that there will be a meaningful basis for distinguishing between the cases in which it is imposed from the cases in which it is not imposed. Common sense tells us that where the offense itself is so narrowly defined, it follows that some of the factors constituting aggravating circumstances would necessarily be similar or idential to elements of the offense.

This Court has recognized the validity of this kind of statute in upholding Florida's death statute in Proffitt v. Florida, 428 U.S. 242 (1976).

The aggravating and mitigating circumstances set out in Florida's death statute are very nearly identical to Alabama's, the only difference being that under Alabama's statute, aggravating circumstance number 4 deletes several of the crimes listed in Florida's statute—arson, aircraft piracy, and the unlawful throwing, placing or discharging of a destructive device or bomb. In upholding the Florida statute in Proffitt, supra, this Court stated:

> "The directions given to judge and jury by the Florida statute are sufficiently clear and precise to enable the various aggravating circumstances to be weighed against the mitigating ones. As a result, the trial court's sentencing discretion is guided and channeled by a system that focuses on the circumstances of each individual homicide and individual defendant in deciding whether the death penalty is to be imposed." at 49 L. Ed. 2d 926.

The Court further stated that the Florida capital sentencing procedures seek to assure that the death penalty will not be imposed in an arbitrary or capricious manner. Id. at 923.

Of course, under Florida's statute as well as Alabama's, many of the aggravating circumstances overlap with elements of the capital offense. See, e.g., State v. Dixon, Fla., 283 So. 2d 1 (1973), where the Florida Supreme Court upheld the constitutionality of Florida's death statute, specifically approving the aggravating and mitigating circumstances, stating:

> "The most important safeguard presented in Fla. Stat. §921.141, F.S.A., is the propounding of aggravating and mitigating circumstances which must be determinative of the sentence imposed. It is argued that the circumstances are vaguely worded in some cases, and that they do not provide meaningful restraints and guidelines for the discretion of judge and jury. We disagree.

> "The aggravating circumstances of Fla. Stat. §921.141(6), F.S.A., actually define those crimes—when read in conjunction with Fla. Stat. §§782.04(1) and 794.01(1), F.S.A.—to which the death penalty is applicable in the absence of mitigating circumstances. As such, they must be proved beyond a reasonable doubt before being considered by judge of jury."

Such a scheme in no way limits individualized consideration of each case, but rather it does ensure reliability in the determination of each particular sentence. For example, suppose there are two defendants who were involved in the same robbery/murder. One of the defendants is seventeen years old, has no prior record, and is not the person who actually committed the murder. The other defendant is 28 years old, has a prior conviction for another felony involving the use of violence, and is the person who pulled the trigger. The first defendant has three mitigating circumstances in his favor and the one aggravating circumstance that the felony was committed while he was engaged as an accomplice in the commission of a robbery. The second defendant has at least four aggravating circumstances against him, one of which is that the felony was committed while he was engaged in the commission of a robbery, and no mitigating circumstances.

It is entirely probable, under such circumstances, that the first defendant would receive a sentence of life imprisonment, while the second defendant would receive a sentence of death. Thus, even though aggravating circumstances which are also elements of the crime are used in the sentencing process, the variety of aggravating/mitigating circumstances involved allows individualized consideration, even to the extent that different results may be reached where two defendants are involved in the same crime.

A. THERE WERE SUFFICIENT AGGRAVATING CIRCUMSTANCES IN THE INSTANT CASE TO WARRANT THE IMPOSITION OF THE DEATH PENALTY.

In the instant case there were two aggravating circumstances found by the trial judge which were not elements of the offense and which, in fact, had nothing to do with the offense for which Thomas was convicted.

These aggravating circumstances were:

(1) that the capital felony was committed by a person under sentence of imprisonment; and

(2) that the defendant was previously convicted of another felony involving the use or threat of violence to the person.

The evidence at trial and at the sentencing hearing reflected that Thomas had two prior convictions for robbery in Alabama and a conviction for second degree murder in Florida. He also had served an earlier sentence in Mississippi.

Petitioner argues that if the Court accepts his contention that robbery cannot be both a definitional element of the crime and an aggravation of the crime then his sentence of death would be based solely on the fact that he was already under a sentence for a violent crime, which he suggests would be an insufficient ground. We certainly do not agree with petitioner's contention that an aggravating circumstance cannot also be an element of the crime. However, even if the aggravating circumstance that the murder was committed during the course of a robbery was not present, the other grounds set out by the trial judge provide ample basis for the imposition of the death penalty. Surely the fact that Thomas had two prior convictions for robbery and one for second degree murder is such strong evidence in aggravation that the trial judge would have been warranted in imposing the death

penalty on those grounds alone. Of course, the statute only requires that the trial judge find one aggravating circumstance in order to fix the punishment at death. Code of Alabama 1975, §13-11-4. Here, the trial judge found four valid aggravating circumstances.

No court has ever held that the sentencing authority must apply a particular standard of persuasion to the sentence decision itself. The Fifth Circuit did not so hold in Spinkellink v. Wainwright, 578 F. 2d 582 (5th Cir. 1978). The United States Supreme Court has never so held. The statutes it upheld in Gregg v. Georgia, 428 U.S. 153 (1976) and Proffitt v. Florida, supra, did not so provide.

If it is ever held that the sentencing decision itself must be made in light of some particular standard of persuasion applied in the sentencing authority's mind, then Alabama's death penalty statute can be so interpreted. See, e.g., Universal Amusement Co. v. Vance, 587 F. 2d 159, 166 (5th Cir. 1978) (en banc); Pugh v. Rainwater, 572 F. 2d 1053 (5th Cir. 1978) (en banc). For now, it should suffice that under any conceivable standard Petitioner was deserving of the death penalty, and no reasonable unbiased person could conceivably have decided the matter differently than the trial court judge in Petitioner's case.

CONCLUSION

Based on the foregoing argument, Respondent submits that the Petition for Certiorari is due to be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this the 28th day of December, 1979, I did serve a copy of the foregoing Brief in Opposition to Petition for Writ of Certiorari to the Supreme Court of Alabama on the attorney for the Petitioner, by mailing a copy of the same to him, postage prepaid and properly addressed as follows:

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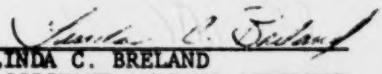

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